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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ROCKAWAY NEWS SUPPLY CO., INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND DISTRICT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND DISTRICT.

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The petitioner seeks a review under 28 U. S. C. 1254 and Section 10(e) of the National Labor Relations Act, as amended, of a judgment of the Circuit Court of Appeals for the Second Circuit, entered on May 12th, 1952 (R. A. 15-21, 23),[1] denying enforcement of and setting aside an order issued by the National Labor Relations Board against Rockaway News Supply Company, Inc. (B. A. 10-14).

Opinions Below.

The opinions of the Circuit Court of Appeals for the Second Circuit (R. A. 15-21, 21-22) are reported at 197 F. 2d 111. Findings of fact, conclusions of law and order

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[1] For the purposes of this brief, the appendix to respondent's brief in the Court below will be designated "R. A." and the Appendix to the Board's brief in the court below will be designated "B. A."

of the National Labor Relations Board (B. A. 7-36) are reported at 96 NLRB 336.

Questions Presented.

Whether it is an unfair labor practice for an employer to discharge an employee who refused to perform part of his usual duties, when that part would involve his crossing a picket line of a union other than his own, at a plant other than that of his employer.

Statutes Involved.

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. I, 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 13-16.

Statement.

1. The Facts.

The facts of this case are set forth at length in the Board's brief (pp. 2-5)[2]; however, a short review of these facts will serve to clarify the issues. The respondent discharged one of its employees for refusing to perform a part of his usual duties, which consisted of picking up and delivering newspapers and periodicals. The employee refused to pick up a bundle of newspapers from the plant of the Daily Review Corporation, Rockville Centre, Long Island, New York, publisher of the Nassau Daily Review Star, which was one of his routine stops. The reason given by the employee (hereinafter referred to as "Waugh") for his refusal to carry out his duties was that the employees

[2] For purposes of this brief, the Board's petition for writ of certiorari will be designated "B. P."

at the plant of the Daily Review Corporation were on strike and were maintaining a picket line about the plant. Waugh insisted that he would not cross a picket line. He was advised by the respondent that he would have to perform all of his usual duties and that he could not unilaterally dictate the terms of his employment. The employer pointed out that Waugh was not a member of the striking union; was not an employee at the struck plant, and that he could not subject this respondent to the vicissitudes of labor strife wherever it might appear. When Waugh continued his adamant refusal, the employer advised him that its only alternative would be to discharge him. Waugh reiterated that he absolutely would not cross any picket line and therefore would not pick up the papers at the Daily Review Corporation. In view of his obdurate position, he was discharged. The collective bargaining agreement then in effect between respondent and the Newspaper and Mail Deliverers' Union, of which union Waugh was a member, provided for arbitration of such disputes. It also had a specific provision against any cessation of work (R. A. 61). The question of Waugh's discharge was submitted to arbitration and the arbitrator upheld the discharge. Waugh thereupon charged respondent with committing an unfair labor practice in that it violated Sections 8(a) (1) and 8(a) (3) of the National Labor Relations Act (hereinafter called the "Act"). The trial examiner sustained these charges and the Board based its decision on the recommendations made by the trial examiner.

2. The Board's Decision.

The Board held that Waugh had a right, guaranteed by Section 7 of the Act, to refuse to cross the picket line and therefore respondent violated Section 8(a) (1) and 8(a) (3) of the Act when he discharged Waugh, even though the

discharge was based on his refusal to perform part of his regular duties. They found that his refusal was based on his unwillingness to cross a picket line at the premises of the Nassau Daily Review Star, one of the stops on his regular route.

While the Board found that Waugh's refusal to cross the picket line was an activity protected by Section 7 of the Act, it conceded that "* * * the Respondent as a normal incident of its right to maintain its operations, could have required Waugh to elect whether to perform all his duties or as a striker, to vacate his job and make way for his replacement by the Respondent" (B. A. 9).

3. The Decision of the Court Below.

The Circuit Court of Appeals for the Second Circuit set aside the Board's order, thus upholding the discharge. For the purposes of this case the Court accepted the Board's contention that the refusal of an employee to cross a picket line of a union other than his own at a plant other than his own, is a right guaranteed by Section 7 of the Act, and still denied enforcement to the Board's order pointing out that these rights are not unlimited. It stated:

> "For, as the Supreme Court pointed out in Republic Aviation Corp. *v.* Board, 1945, 324 U. S. 793, 798; 'like so many others these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee' " (R. A. 17).

The Court analogized this situation to that group of cases dealing with soliciting union membership on company property. Those cases hold that although the employer may not forbid such solicitation if it is not done on company time, it is within the province of an employer to promulgate and

enforce rules prohibiting it during working hours (R. A. 18). The Court goes on to state:

> "* * * The right to assist a union of which one is not a member by refusing to cross a picket line is certainly of no higher dignity or importance to the individual than the right to ask his fellow workers in his own plant to join with him in the union of which he is a member in concerted activities which will directly protect or aid in promoting their common interests" (R. A. 18).

Completing the analogy to the instant case, the Court holds that although the employer may not force an employee to cross a picket line outside of working hours, he may require the employee to perform his routine duties while on company time.

The Court stated that a discharge of an employee who refused to cross a picket line on his own time, while he was not working for the company, would of course be a violation of Section 8(a)(1); however, the same refusal on company time is a usurpation of management rights and would enable the employee unilaterally to dictate the terms of his employment, which of course he may not do.

The Court also found that had Waugh gone out on a "one man strike" as the Board suggests, he could unquestionably have been replaced as an economic striker since no unfair labor practice against his own employer was involved. It is inconceivable that he could have won his strike because he had no grievance with respondent which could have been determined in his favor, and furthermore his own Union could not have supported him since that would have been an unfair labor practice under Section 8(b)(4).

Under all these circumstances and in view of the direct holding of the Court of Appeals for the Seventh Circuit in

N. L. R. B. v. *Illinois Bell Telephone Co.*, 1951, 189 F. 2d 124, cert. den. 342 U. S. 885, which dealt with substantially the same questions as are here involved, the Court concluded that the discharge should be upheld and the Board's order set aside.

Reasons for Denying Writ.

It is submitted that this case does not present any novel questions of first impression which have not been considered before by this Court. In *National Labor Relations Board* v. *Illinois Bell Tel. Co.*, C. C. A. 7th, 1951, 189 F. 2d 124, the Seventh Circuit had to decide substantially the same questions as are involved in the instant matter. When the decision of that Court was handed down setting aside the Order of the National Labor Relations Board, the Board sought a writ of certiorari which this Court denied at 342 U. S. 885. The facts in that case raised the same issues which are involved in this case and, in fact, presented a more favorable situation from the Board's point of view. In that case a strike had been called by the Illinois Telephone Traffic Union (hereinafter referred to as I. T. T. U.) and picket lines had been established at the employer's offices throughout the State of Illinois. Another union, known as the Chicago Telephone Traffic Union (hereinafter referred to as C. T. T. U.), represented the employees working in the same industry within the confines of the City of Chicago. The C. T. T. U. was not engaged in the strike, either officially or unofficially, and was at that time negotiating with the employer for a new contract covering its members. The I. T. T. U.'s picket lines were also placed around the Chicago offices of the Illinois Bell Tel. Co. Eight supervisory employees who

worked in the Chicago area refused to cross the picket lines set up by the I. T. T. U. and therefore did not report to work. The employer informed these supervisors that their jobs would be in jeopardy if they did not immediately report back to work and that they were being demoted from supervisors to operators. They were also advised that their employment would be suspended as of the first day they failed to report for the new assignment. It must be noted that some of the employees involved held membership in both unions at the time of the strike; seven were members of the striking union; three were members of the C. T. T. U., and one was not a member of either. However, all eight employees were in the bargaining unit represented by the C. T. T. U. The Court was therefore faced squarely with the following questions:

1. Whether an employee may refuse to cross a picket line set up around the plant in which he is employed, by a union to which he does not belong, for a cause in which the employee could not possibly profit?

2. Whether an employee can refuse to cross a picket line set up about the plant in which he is employed by a Union of which he is a member but which does not represent the bargaining unit in which he is employed?

The Seventh Circuit answered both of these questions in the negative and held that by their refusal all of these employees were subject to disciplinary action by the employer and that such disciplinary action would not be an unfair labor practice or a violation of Section 7 of the Taft-Hartley Act. The Court answered the Board's contention that these acts were in reality a strike by the employees, at page 127, *supra:*

"The crucial issue, as we view the situation is whether the eight employees were protected by §7 of the Act. If so, the finding of an unfair labor practice and the order resulting therefrom is sustainable; otherwise, not. * * * It is the Board's theory that the eight employees were engaged in 'concerted activities' for their 'mutual aid or protection.' The Board terms the activities of the eight employees a 'strike', while respondent labels it as a 'wildcat strike'. *In our view it was not a strike in any ordinary connotation of that term.*" (Italics supplied.)

The Court accepted the definition of a strike as contained in the American-English Encyclopedia of Law, Vol. 24, page 123, as follows:

"The term 'strike' is applied commonly to a combined effort on the part of a body of workmen employed by the same master to enforce a demand for higher wages, shorter hours, or some other concession, by stopping work in a body at a prearranged time, and refusing to resume work until the demanded concession shall have been granted."

It then went on to state:

"We think it is a novel theory that the mere refusal to cross a picket line, in the absence of any other activity, makes the one who refuses a party to the strike, but even so, as already shown, such refusal was not for the 'mutual aid or protection' of the employees involved. It could have only been for the benefit and aid of those in a different bargaining unit, the representative of which could not have represented the involved employees, and, consequently, could have obtained nothing from respondent for their benefit. * * * Other than the incidents which we have discussed, there is not a scintilla of

> proof that respondent interfered in any form or manner with the right of its employees to join a labor organization of their own choice, or that it refused to bargain collectively with th agents selected by such employees. * * * There is no evidence of any hostility or favoritism on behalf of respondent against or for any union."

In that case, as in the one at hand, there is no evidence that the employee in question acted in combination or concert. Each acted in his own individual capacity. The refusals to cross the picket line were a matter of principle and their object was merely to support the grievances of others. Waugh could not have acted in concert with his union in this case, since, as the Court below found, that would have been a violation of § 8(b)(f) of the Taft-Hartley Act, and would have rendered his union guilty of an unfair labor practice under that section (R. A. 19). Hence, the actions of Waugh and of the eight supervisors in the *Illinois Bell Tel. Co.* case could not possibly have constituted a strike.

In the case at hand the issue is even more clear-cut. Waugh was not a member of the striking union; the picket line was not before the plant in which he was employed; the evidence does not indicate that the respondent interfered in any form or manner with Waugh's right to join a labor organization of his own choice, or that the respondent showed any hostility or favoritism for or against any union. Thus respondent was merely attempting to operate his business in accordance with the terms of its union contract without suffering economic damage from causes beyond its control. It cannot and has not been claimed that this employer was attempting to influence his employees in their choice of a bargaining representative, nor that he was

discriminating among his employees due to union activity. His only crime was in attempting to maintain his business operation in the face of labor turmoil at one of his customers' plants. The protection of the Labor-Management Relations Act of 1947 has never been stretched to the length for which the Board now contends.

Therefore, our attention is focused to the same issue as has already been decided by the Seventh Circuit and on which question this Court has previously denied certiorari; that question being whether or not it is a violation of Section 7 of the Act or an unfair labor practice under Section 8(a)(1) or 8(a)(3) for an employer to discipline an employee who refuses to perform his regular duties on the grounds that he will not cross a picket line maintained by a union of which he is neither a member nor with which he has a common cause. Although the Court was not willing to accept the Board's contention that the employees in that case engaged in "concerted activities" within the meaning of the Act, it stated that that assumption would have had no bearing upon its decision, since accepting that proposition they still could not find that those activities were for their "mutual aid or protection". The Court states at page 128, *supra*:

> "* * * They neither sought nor were entitled to seek on their own behalf any aid or protection from respondent. * * * In other words, these employees were without right to bargain with respondent or to strike because of any grievances which they had or for their own aid or protection, but they had such right, according to the Board, in behalf of employees of a different unit and represented by a different bargaining agent."

The Court then quotes from *National Labor Relations Board* v. *Draper Corp.*, C. C. A. 4th, 145 F. 2d 199, 202:

> "The purpose of the Act was not to guarantee to employees the right to do as they please, but to guarantee to them the right of collective bargaining for the purpose of preserving industrial peace."

However broad the principles of the picket line and whatever custom may attach to that particular method of persuasion, rights of employees under the Act are limited by the language of the Act. In both its language and underlying policy, the Act speaks in terms of a particular employer-employee relationship to be regulated, and does not require an employer to defer the conduct of his daily operation to abstract concepts of labor solidarity. Obviously, so broad a right as that claimed by the Board could not have been conferred merely by implication. In the fact of the express language of the Act and the clear underlying policy which pervades it, the Board urges a tortured interpretation as the basis for its application for a writ of certiorari. It is sufficient to state that the interpretation for which the Board contends has never been made by any Court in the sixteen-year history of Section 7.

The employee rights for which the Board contends are practically unlimited in scope—they would include the right of employees to assist or participate in any national or local labor dispute in any manner deemed appropriate, regardless of how such participation or assistance may derogate from the daily operation of an employer's business. It is difficult to conceive that so broad and drastic a right exists without specific legislative authorization or that it should have lain dormant through the sixteen stormy years of the Act's history.

Conclusion.

The petition for a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit should be denied.

Dated: New York, N. Y., October 2, 1952.

Respectfully submitted,

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Appendix.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are as follows:

Rights of Employees.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices.

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer

in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) To refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of Section 9(a);

(4) To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft or class rather than to employees

in another labor organization or in another trade, craft or class, unless such employer is failing to conform to an order of certification of the Board determining the bargaining representative for employees performing such work: *Provided*, that nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *.

* * * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *

* * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are on vacation, any district court of the United

States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *